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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CARLOS M. QUEZADA, Defendant and Appellant.	B200954 (Los Angeles County Super. Ct. No. KA065472)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed as modified.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Carlos Quezada was convicted of one count of murder, two counts of attempted murder and one count of shooting at an occupied motor vehicle, with gang and firearm allegations found true. The trial court sentenced Quezada to two life terms with the possibility of parole, plus 95 years to life and another 30 years in state prison. He appeals, claiming error in the trial court's rejection of his proposed third-party culpability evidence, insufficiency of the evidence supporting the firearm enhancement on one count and sentencing error. The judgment is affirmed but the sentence must be modified to delete the consecutive 10-year gang enhancements to Quezada's convictions.

FACTUAL AND PROCEDURAL SYNOPSIS[1]

On February 7, 2004, at about 2:30 or 3:00 a.m., Brenda Ramirez had gone to look for her boyfriend Edgar Martinez at someone else's house but was heading home when she did not find him. On her drive home, however, she saw Martinez and two of his friends in a white Hyundai hatchback. He pulled behind her in the left-turn lane to enter the southbound 605 freeway from Los Angeles Street in Baldwin Park. She heard gunshots and saw Martinez drive over the island and onto the freeway. She saw another big dark car drive away. The driver looked back at her. She later identified Quezada's picture along with one other in a six-pack photo lineup, indicating they looked like the driver. Ramirez initially described the car as dark or black but then clarified it was a "black Dodge Durango S.U.V. sort of vehicle" with dark tinted windows and a tan interior. She said it was somewhat wider on the bottom and narrower at the top.

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1 Quezada was also charged with a separate murder but the jury was unable to reach a verdict on this count, and he was found not guilty of the second murder on retrial. Accordingly, we address only the facts at issue in this appeal.

At about 3:35 a.m., Baldwin Park police officer Jeffrey Honeycutt conducted a traffic stop on the Hyundai Martinez was driving for speeding southbound on Syracuse Avenue, in the direction of Kaiser Hospital, and about three blocks from the intersection of Los Angeles Street and the 605 freeway. Martinez pulled over before Honeycutt sounded a siren or turned on his additional lights. Martinez got out of the car and called the officer over. As he approached, Honeycutt saw the front passenger (Martin Lozoya who was 17 years old) "appeared to have several gunshot wounds to the upper right side of his torso. He was moaning and groaning, bleeding profusely, and said something to the effect of 'I'm going to fucking die.'" Lozoya was treated at the scene and transported to the hospital but later died.

The passenger in the back (Enrique Flores, also 17) "was bleeding profusely from the head." Honeycutt could see a "gunshot wound in the upper right forehead area."

Photographs depicted a "heavy concentration of blood" in the rear passenger seat where Flores had "slumped over" after being shot in the head.

Officers secured the scene on Syracuse Avenue and collected and booked evidence. They found two spent shell casings in the white Hyundai (a .22-caliber casing on the front passenger seat; and a second .22-caliber casing beneath the front passenger seat). Both were found to have been manufactured by Federal.

The right front passenger window (clear glass) was broken. The right rear passenger window was also shattered and some glass was collected. There were three holes in the window and one showed a bullet had traveled through a window and out the rear portion on the driver's side.

At about 3:42 a.m., City of Irwindale Police Detective Raymond Gonzales received a report of a shooting and responded to the area of Los Angeles Street and the 605 to secure the scene. At the left turn pocket for the southbound 605 freeway, he saw

some glass with some spent shell casings—a total of four .25-caliber casings (two manufactured by Winchester and two by PMC) plus two .22-caliber casings manufactured by Federal. There were also bloodstains on the ground. The two .22-caliber casings found at the Los Angeles Street scene and the two .22-caliber casings found in the white Hyundai were fired from the same firearm. The four .25-caliber casings found at the Los Angeles Street scene were fired from the same firearm.

While on patrol at about 11:08 p.m. on February 8, Officer Honeycutt saw a black Toyota Highlander traveling westbound on Los Angeles Street. The Highlander failed to make a complete stop as required at an intersection, and Honeycutt followed, attempting a traffic stop for the violation. The Highlander pulled over, and Honeycutt approached, but then saw a male passenger with short hair in the driver's side back seat open the door and attempt to get out. Honeycutt drew his gun and ordered the man back into the car and he complied. Honeycutt looked at the driver and saw that it was Quezada. Quezada then accelerated with Honeycutt in pursuit.[2]

Quezada pulled over to the far left southbound lane of travel (Grace Avenue) and then drove against traffic onto the northbound lanes. He slowed, almost to a complete stop, and Honeycutt saw the passenger exit, run eastbound up a driveway and jump a fence. Quezada then accelerated, made a left turn and exited the still-moving Highlander, running north and scaling a six-foot fence.

Honeycutt got out of his car and saw Quezada running in the rear yard of a residence. He yelled for Quezada to stop, but Quezada ignored him. Appearing winded, Quezada was unable to scale another wall and attempted to duck and hide. Honeycutt drew his weapon and ordered Quezada to get down on the ground. Quezada complied, indicating, "Okay. Okay. You got me." When backup arrived, Quezada resisted arrest and reached for his waistband but was ultimately arrested. Honeycutt noted a small rear tinted window on the driver's side of the Highlander was broken. The car was towed.

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2 It was later determined that the Highlander was stolen.

On February 19, while investigating the separate murder count with which Quezada was also charged (on which he was later acquitted), Sergeant Richard Garcia of the Los Angeles County Sheriff's Department had Quezada placed in a jail cell with fellow members of the Bassett Grande gang. When Quezada was alone with Richard Jaramillo, their conversations were recorded, and Quezada made statements implicating himself in the shootings so Garcia contacted the investigating officers. Quezada said he had a .25-caliber gun, the type used in the shooting at issue in this case. He said he had blasted "a car load" in Irwindale "just before the freeway," that one of the victims was probably 17 years old, and they had not "blast[ed] back." He said he had been in a "bad ass black Highlander," the one he "got bust in," and said he had been in the "papers" three times in the last month.

Detective Katz searched the impounded Highlander and found a .25-caliber shell casing on the driver's side, in the depression "where the driver's side seat belt is attached to the actual frame of the car."[3]

Quezada was charged with conspiracy to commit murder (count 1); the murder of Eric Rosales on a separate occasion which is not at issue in this appeal (count 2); the murder of Lozoya (count 3), with special circumstances allegations for multiple murders; the attempted murder of Martinez (count 4); the attempted murder of Flores (count 5); and shooting at an occupied motor vehicle (count 6), with gang and firearm allegations.[4] Quezada was charged and tried jointly with Huguez. A separate jury acquitted Huguez on count 2 and hung on counts 3 through 6. Huguez is not a party to this appeal.

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[3] A juice bottle in the back had the fingerprints of his co-defendant (Victor Huguez). A search warrant executed at Huguez's home resulted in the seizure of live ammunition for .22- and .25-caliber guns, some of which, made by Federal, was found to have been "worked through the action of the same firearm that fired the" .22-caliber casings found during the investigation.

[4] The prosecution later elected not to proceed on count 1 and ultimately did not pursue the death penalty.

At trial, the People presented evidence of the facts summarized above, along with evidence regarding Quezada's gang involvement and the evidence that the crimes were committed for the benefit of his gang.

In his defense, Quezada presented the testimony of an employee at the body shop where the Highlander was taken. The manager took photographs and did not recall seeing a shell casing, but photographs showed a copper or brass item "sticking out" from an area underneath a black rectangle. Because of the police investigation, it was not touched for repairs but people had access to it.

In addition, Quezada presented an expert regarding factors affecting the reliability of eyewitness identifications.

Quezada was convicted of the murder of Lozoya, the attempted murders of Martinez and Flores and of shooting at their occupied vehicle. The gang and firearm allegations were found true.

The trial court sentenced Quezada to two life terms with the possibility of parole, plus 95 years to life and another 30 years in state prison, calculated as follows: as to count 3, Quezada was ordered to serve a term of 25 years to life plus 25 years to life for the firearm use enhancement and 10 years for the gang enhancement. On count 4, he was ordered to serve a life term with the possibility of parole plus 20 years for the firearm use enhancement and 10 years for the gang enhancement to be served consecutively to count 3. On count 5, Quezada was sentenced to a term of life with the possibility of parole plus 25 years to life for the firearm use enhancement and 10 years for the gang enhancement to be served consecutively to counts 3 and 4. As to count 6, the court imposed a stayed mid-term of 5 years plus 35 years for the firearm use and gang enhancements.

Quezada appeals.

DISCUSSION

I. Quezada Has Failed to Demonstrate Prejudicial Error in the Trial Court's Exclusion of his Proposed Third Party Culpability Evidence.

According to Quezada, the trial court erred in excluding his third party culpability evidence and, as a result, denied him his right to present a defense and violated his due process right to a fair trial. We disagree.

At trial, Quezada attempted to present evidence that Antonio Sapien was responsible for the shooting involving Lozoya, Flores and Martinez. He had moved to learn the identity of a confidential reliable informant who had told Whittier Police that Sapien was responsible for this shooting. In support of this motion, defense counsel stated that Whittier Detective Ralph Kremlin had identified Sapien and his friend Larry Trujillo as gang members and said Trujillo was arrested less than 24 hours after the shooting driving a Dodge Durango (the type of car Ramirez had initially mentioned). He further stated that a California Highway Patrol detective (Brian Caporrimo) advised that Sapien was a suspect in a car-to-car freeway shooting and two loaded firearms had been recovered from his car at the time of his arrest. Both Sapien and Trujillo were arrested and interviewed but Sapien was eliminated as a suspect after detectives investigated his alibi.

Later, during the testimony of the investigating officer in the Lozoya shooting (Steven Katz), the prosecutor advised the court defense counsel intended to question the detective regarding Sapien in support of a third party culpability theory and objected on the basis of Evidence Code section 352, citing the Sheriff's Department's investigation and conclusion regarding Sapien.

Defense counsel argued a factual nexus between Sapien and the shooting: Ramirez first told detectives the shooter was driving a Dodge Durango, the same type of

car (he said) Sapien was driving at the time of his arrest.[5] He argued Sapien's DMV photograph fit the description Ramirez had given to police of a male Hispanic with a fade haircut and said he wanted to ask the detective why Sapien's photograph was not included in the lineup shown to Ramirez, reminding the court of his prior motion seeking the informant's identity.

The trial court determined "here there is no connection whatsoever other than a similar vehicle; and, based on the court's in camera review," exercised its discretion to exclude this evidence under Evidence Code section 352, citing the undue consumption of time and the collateral nature of this information as it related to [the Lozoya shooting]."

"To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

As our Supreme Court has explained: "'[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352).'"[6] (*People v. Lewis* (2001) 26 Cal.4th 334,

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[5] It appears from the record, however, it was Trujillo (not Sapien) who had been driving a Dodge Durango at the time of his arrest.

[6] As the United States Supreme Court specifically recognized the validity of the Evidence Code section 352 type of analysis considered in *People v. Hall, supra,* 41 Cal.3d 826, Quezada's reliance on *Holmes v. South Carolina* (2006) 547 U.S. 319 is misplaced. The problem in *Holmes* was South Carolina's adoption of an "arbitrary" rule that "radically changed and extended the ["well-established" and "widely accepted"]

372, quoting *People v. Hall, supra,* 41 Cal.3d at p. 834.) An "inquiry into the admissibility of such evidence and the balancing required under [Evidence Code] section 352 will always turn on the facts of the case." (*People v. Hall, supra,* 41 Cal.3d at p. 834.) A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion. (*People v. Lewis, supra,* 26 Cal.4th at pp. 372-373, citation omitted.)

Here, although Ramirez first mentioned a blue or black Dodge Durango as the type of car that left the scene of the shooting (and Sapien's friend and fellow gang member Trujillo was apparently arrested driving a blue Durango), she then clarified that the car was black. Later, when she was shown photographs of a Dodge Durango and a Toyota Highlander, she said the Highlander, not the Durango, was like the car she had seen. Moreover, the .25-caliber shell casing matching casings recovered at the scene were found in the Highlander, and it was the Highlander that had a broken tinted window. This record does not support Quezada's contention that the trial court erred in excluding this proposed evidence, but even assuming error, Quezada cannot establish prejudice in any event. Given the weight of the evidence against him—including his own statements and admissions regarding the shooting—it is not reasonably probable Quezada would have obtained a more favorable result had this evidence been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Rains* (1999) 75 Cal.App.4th 1165, 1170.)

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rule" permitting the exclusion of third-party culpability evidence "if its probative value is outweighed by certain other facts such as unfair prejudice, confusion of the issues, or potential to mislead the jury." (*Holmes v. South Carolina, supra,* 547 U.S. at pp. 326, 327.) Unlike Evidence Code section 352 which the trial court applied in this case, the South Carolina rule specified that a "defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." (*Id.* at p. 321.)

II. Quezada's Sentence on Counts 3, 4 and 5 Should Be Modified.

Quezada says the trial court erred in imposing consecutive 10-year terms for the criminal street gang enhancements. The People concede and we agree that the abstract of judgment must be modified as to counts 3, 4 and 5 to delete the 10-year gang enhancements imposed under Penal Code section 186.22 as the statutory scheme mandates a 15-year minimum parole eligibility period instead because Quezada was sentenced to a life term on those counts. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1007.)

In *People v. Lopez, supra*, 34 Cal.4th 1002, our Supreme Court explained that under the "plain language of [Penal Code] section 186.22[, subdivision] (b)(5)," a first degree murder committed for the benefit of a gang is not subject to the 10-year enhancement in Penal Code section 186.22, subdivision (b)(1)(C); instead, such a murder falls within that subdivision's excepting clause and is governed by the 15-year minimum parole eligibility term in Penal Code section 186.22, subdivision (b)(5).[7] (*Id.* at p. 1011.) The same reasoning applies to an attempted premeditation murder committed for the benefit of a gang. For the reasons stated in *People v. Lopez, supra,* 34 Cal.4th 1002, the

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[7] As applicable, Penal Code section 186.22, subdivision (b)(1) provided: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: . . . (C) If the felony is a violent felony, as defined in subdivision (c) of [s]ection 667.5, the person shall be punished by an additional term of 10 years."

However, subdivision (b)(5) specifies: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served*." (Italics added.)

10-year gang enhancements relating to counts 3, 4 and 5 must be stricken. Only the 15-year parole eligibility minimum of subdivision (b)(5) applies.

III. Substantial Evidence Supports the Jury's Finding that Flores Suffered Great Bodily Injury.

In connection with Quezada's conviction for the attempted premeditated murder of Enrique Flores (count 5), the jury found Quezada had personally discharged a firearm, proximately causing great bodily injury within the meaning of Penal Code section 12022.53, subdivision (d). According to Quezada, this enhancement must be reversed as the finding of great bodily injury is not supported by the evidence. We disagree.

According to the record, Flores was "bleeding profusely from the head" as the result of "a gunshot wound in the upper right forehead area." There was police testimony regarding the "heavy concentration of blood" in the back seat where Flores had been sitting before he "slumped over." The jury was specifically instructed regarding the definition of great bodily injury. The jury's finding is amply supported by substantial evidence. (*People v. Escobar* (1992) 3 Cal.4th 740, 744; *People v. Mendias* (1993) 17 Cal.App.4th 195, 205-206.)

DISPOSITION

The judgment is modified to delete the 10-year gang enhancements as to counts 3, 4 and 5 imposed under Penal Code section 186.22, subdivision (b)(1)(C) and to reflect the 15-year minimum parole term under Penal Code section 186.22, subdivision (b)(5). In all other respects, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment consistent with this opinion. The superior court clerk is then directed to deliver the corrected abstract of judgment to the Department of Corrections. However, as the People note, the court should have imposed

a $20 security fee for each count other than count 6 so this correction should be made as well. (See *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.)

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WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**